87-939

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HENRY AND SARAH DORNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Honorable Trial Judge committed reversible error in failing to admit into evidence the findings of fact and conclusions of law of the Board of Veterans Appeals issued in this case, which Board found negligence on the part of the Veterans Administration in the administration of the myelogram which paralyzed Petitioner, and which findings of fact and conclusions of law should have been admitted under Rule 803(8) of the Federal Rules of Evidence.

TABLE OF CONTENTS

PAGE

Questions Presented i
Opinions Below 2
Jurisdiction 2
Statutes Involved 2
Statement Of The Case 6
Reasons For Granting Writ 9

APPENDIX

Opinion Of Honorable Donald Walter, United States District Court, Western District Of Louisiana A-1
Judgment Of October 22, 1986 ..... A-14
Opinion Of United States Court Of Appeal For The Fifth Circuit Entered On July 21, 1987 ... A-15
Findings And Decision Of The Veterans Administration Board Of Veterans Appeals Dated October 1, 1986 ..... A-44
Order Of October 6, 1986 ..... A-53
Court of Appeal Statement of Mandates A-55

TABLE OF CASES

PAGE

Fraley v. Rockwell International Corporation,
470 F.Supp. 1264 (S.D. Ohio, 1979) 9
Lloyd v. American Export Lines, Inc.,
580 F.2d 1179 (3 Cir. 1978) 10
Local Union 59, International Brotherhood
of Electrical Workers v. Namco Electric, Inc.,
653 F.2d 143 (5 Cir. 1981) 9
Melville v. American Home Assurance Company,
443 F.Supp. 1064 (E.D. Pa. 1977) 10
Sage v. Rockwell International Corporation,
477 F.Supp. 1205 (D. New Hampshire 1979).... 9
Smith v. Ithaca Corporation,
612 F.2d 215 (5 Cir. 1980) 10

STATUTES

Federal Rules of Evidence, Rule 803(8) 2
28 USC 1346 3

LIST OF PARTIES

The parties are named in the caption of this case. Petitioners, HENRY and SARAH DORNER, are husband and wife.

IN THE

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HENRY AND SARAH DORNER,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, HENRY and SARAH DORNER, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 21, 1987.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana, Honorable Donald E. Walter, Judge, entitled "Ruling" is unreported and is printed in Appendix A hereto, infra, page A-1. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this matter, entered on July 21, 1987, is unreported and is printed in Appendix A hereto, infra, page A-15. The certified copy of the judgment of the Fifth Circuit was issued as and for the mandate of the court as reflected by the notice from the clerk of the United States Court of Appeals for the Fifth Circuit. A copy of that notice is also included in Appendix A, page A-55.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page A-15) was entered on July 21, 1987. Re-hearing was not applied for. The jurisdiction of the Supreme Court is invoked under 28 USC 1254.

STATUTES INVOLVED

The statutes involved herein are as follows:

Rule 803, Federal Rules of Evidence:

> "The following are not excluded by the hearsay rule even though the declarant is available as a witness:
>
> ...
>
> (8) Public Records and Reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was duty to report excluding however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

28 USC 1346:

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act

of Congress, or any regulation or an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

STATEMENT OF THE CASE

On October 12, 1983, Petitioner, HENRY DORNER, was admitted as an in-patient to the Veterans Administration Hospital in Shreveport, Louisiana. MR. DORNER had fallen at his home a short time prior to his admission and was experiencing pain in his legs. Various tests were done, including myelograms, two (2) of which were unsuccessful, and a CT Scan which showed tumor material in his spine. On November 8, 1983, surgery was done on MR. DORNER for removal of the tumor material. The physicians who treated him, notably Drs. Benzel and Liles, were happy with the results of the surgery and MR. DORNER was progressing nicely. By an entry in the medical records, dated November 23, 1983, Dr. Liles indicated that MR. DORNER'S progress was so good that he was going to release him from the hospital shortly. However, on that date, another myelogram was scheduled and performed at approximately 1:00 p.m. on that date. Ever since that time, MR. DORNER has been paralyzed from the waist down. The medical records indicate that the physicians connected the myelogram to the paralysis although at trial the government made an effort to divorce the myelogram from the paralysis. However, all experts agreed that MR. DORNER is permanently paralyzed.

Subsequent to his discharge from the Veterans Administration Hospital on January 13, 1984, MR. DORNER made several out-patient visits to the Veterans Administration Hospital. He developed a decubitus ulcer on his buttock which was diagnosed by the Veterans Administration in March but which eventually resulted in surgery for the virtual removal of his buttock at a hospital in Monroe,

Louisiana, in June, 1984.

Petitioners, who are husband and wife, filed administrative claims with the Veterans Administration for damages for negligent treatment both with regard to the myelogram and resulting paralysis and with regard to mistreatment of the decubitus ulcer. MRS. DORNER claimed loss of consortium in connection with her husband's injuries. These claims were denied by the Veterans Administration and suit was filed in The United States District Court for the Western District of Louisiana. In District Court Suit No. 85-2232, the DORNERS complained of the treatment with regard to the myelogram and in Suit No. 85-2233 they complained of the mistreatment of the decubitus ulcer. These suits were consolidated for trial and trial took place before the Honorable Donald Walter, United States District Judge, sitting without a jury on September 10 and 11, 1986.

The Honorable Trial Judge took the matter under advisement but before his decision was rendered, the Board of Veterans Appeals in Washington, D.C. issued its findings of fact and conclusions of law wherein it found, reviewing the same medical records which were presented into evidence at the trial, that the Veterans Administration was negligent in giving the post-surgery myelogram and in the method of administration thereof. Counsel for Petitioners filed a motion to reopen the case for reception of that evidence but that motion was denied and the Honorable Trial Judge ruled that the findings of fact and conclusion of law of the Veterans Administration Board of Appeals were inadmissible. Subsequently, the Honorable Trial Judge issued his ruling wherein he resolved all dis-

puted facts in favor of the government and denied Petitioners' claims. A motion for new trial was filed by Petitioners on several grounds including the failure of the Court to receive the findings of fact and conclusions of law of the Board of Veterans Appeals. This motion was denied.

Petitioners appealed the District Court decision to the Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the District Judge but on the issue concerning the admissibility of the findings of fact and conclusions of the law of the Board of Veterans Appeals, the Fifth Circuit held that the issue was a close one but nevertheless affirmed. Petitioners therefore seek certiorari for review of this decision.

REASONS FOR GRANTING WRIT

Petitioners submit that the admission into evidence of the findings of fact and conclusions of law of the Board of Veterans Appeals was critical in a close factual case. The failure to admit this important evidence under Rule 803(8) of the Federal Rules of Evidence renders that part of the Rule meaningless.

Several Courts have admitted similar material. In the case of *Fraley v. Rockwell International Corporation*, 470 F.Supp. 1264 (S.D. Ohio, 1979), the Court held that a report by the Naval Rework Facility containing conclusions about the cause of an air crash which were developed from engineering analysis based upon the wreckage was admissible into evidence under Rule 803(8).

In *Local Union 59, International Brotherhood of Electrical Workers v. Namco Electric, Inc.*, 653 F.2d 143 (5 Cir. 1981) the Court allowed into evidence a letter containing the results of an investigation by the regional director of the Nation Labor Relations Board. The Court held that these were factual findings resulting from an investigation made pursuant to authority granted by law and therefore admissible under Federal Rules of Evidence, Rule 803(8)(C).

In the case of *Sage v. Rockwell International Corporation*, 477 F. Supp. 1205 (D. New Hampshire 1979) the Court considered the admissibility of the same Naval Rework Facility Report and JAG report considered by the Court in *Fraley v. Rockwell International Corporation*, supra. The Fraley Court had held that the JAG report was

inadmissible under the Rule because the investigator lacked experience and his report was therefore untrustworthy. The Court in *Sage* considered both reports to be admissible and the lack of experience of the JAG investigator was considered to affect the weight of the evidence, not its admissibility.

In *Smith v. Ithaca Corporation,* 612 F.2d 215 (5 Cir. 1980) the Court affirmed the admission of a Coast Guard report containing factual findings concerning the properties of benzene which were made pursuant to an investigation of the sinking of a ship. The Court recognized that certain conclusions of law contained in the report were not admissible as "factual findings" but since they had no bearing on the issue there was no error in the admission of the entirety of the report. In the present matter, the Board of Veterans Appeals' conclusion of law does not relate to the issues in the present case. However, their findings of fact are directly related to the case and are admissible.

Other cases have allowed official government reports into evidence. See *Melville v. American Home Assurance Company,* 443 F.Supp. 1064 (E.D. Pa. 1977), in which federal aviation administration airworthiness directives were ruled admissible in a case involving an aircrash; and *Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3 Cir. 1978), where judgement in favor of the Plaintiff was reversed and the matter remanded for new trial where the Trial Court refused to allow a Coast Guard hearing examiner's findings into evidence.

In the present matter, the case was tried before the Honorable Trial Judge on September 10 and 11, 1986. On

October 1, 1986, the Board of Veterans Appeals, Washington, D.C., reviewed the case through veterans' channels and issued its findings of fact and conclusions of law in which it found that the myelogram in question was not a proper procedure to be done at the time that it was done and that it was done negligently.

Since the Honorable Trial Judge had not issued his decision when the Board's decision was made, Petitioners filed a motion to reopen the case and admit this decision into evidence. The Honorable Trial Judge denied the motion.

Subsequently, after the Trial Judge rendered his decision, Petitioners also moved for a new trial on newly discovered evidence, that being the decision of the Board of Veterans Appeals, among other grounds. This motion was also denied. The decision of the Board of Veterans Appeals proffered in the lower court and is therefore properly before this Court for review.

It should be noticed that one of the members of the Board of Veterans Appeals is a medical doctor. Further, the Board states on page 5 of its decision that it conducted an independent medical review. This is obviously reliable evidence.

The Honorable Trial Judge rejected Petitioners' motion to reopen the case and receive this evidence for two (2) stated reasons. First, he stated that the Board's decision was made without the original medical records. That was so stated by the Board. However, this is a distinction without a difference. The Honorable Trial Judge had the

original records and that is why they were not available to the Board. There is no indication that the Board had any problem with the case as it indicates it had a copy of the appropriate records.

Second, the Honorable Trial Judge stated that the legal standard applied under the law being used by the Board was not the standard that the Court must apply. That might make some difference on the Board's conclusions of law but that would not have any effect on the Board's findings of fact. Even if it did, Rule 803(8) does not qualify the admission of such a report by what legal standard was being used. This Board, which had a physician as a member, reviewed the very same medical records which the Court had before it and found the facts therefrom. The very facts sought to be proven by Petitioners herein were found by this Board. The Honorable Trial Judge's refusal to allow this decision with findings of fact favorable to Petitioners into evidence simply is not supported by the law.

The government's expert witnesses testified that they did not know what caused the paraplegia. They advanced several theories but these theories were not supported by the evidence. The Honorable District Judge totally ignored the testimony of Petitioners and the evidence presented by them. He resolved all disputes in favor of the government, despite the fact that the government doctors could not testify definitely as to what had occurred. With the matter in that posture, the Honorable District Judge was in no better position to decide the facts than the Board of Veterans Appeals. It is respectfully submitted that in a close factual situation, the decision of the government

agency should be pursuasive and in this case should have carried the day for Petitioners. The reasons stated for the rejection of the Board of Veterans Appeals' decision could be given for any government agency decision and therefore none would ever be admissible. This is the reason that Petitioners contend that the non-admission of this evidence renders Federal Rule of Evidence 803(8) totally ineffective. It is as if that Rule did not even exist.

It is certain that the redactors of the Federal Rules of Evidence knew that there were many and varied standards being applied by various government agencies; but they nevertheless adopted the Rule with the intent that those decisions be admissible. It is well to note that the Rule does not say that such government decisions are conclusive, just that they are admissible. However, in an extremely close case like the present one, the government agency decision should be enough to sway the scales of justice in favor of the Plaintiffs.

It is respectfully submitted that this issue warrants the attention of the Honorable Court. The Fifth Circuit in its opinion, at page 22, stated:

> "We think this vast difference in applicable legal standards provided a sufficient basis for the District Court's determination that the Board of Veterans Appeals' decision would not assist it in deciding Dorner's case."

It is submitted that this is an incorrect analysis under Federal Rule of Evidence 803(8). Petitioners find no decision of this Honorable Court construing this Rule. It is sim-

ply unjust that Petitioner, HENRY DORNER, will have to live the rest of his life as a paraplegic without having had a fair consideration of the evidence in his case. This Court's guidance on this issue is obviously needed; otherwise, the lower courts will be allowed to virtually read Federal Rule of Evidence 803(8) out of the Federal Rules of Evidence.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted, and this case reviewed by this Honorable Court.

Respectfully submitted,

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BY: _____
C. DANIEL STREET

Attorneys For Petitioners

DATED: October _____, 1987.

CERTIFICATE OF SERVICE BY MAIL

I, C. DANIEL STREET, a member of the bar of the Supreme Court of the United States and Counsel of Record for HENRY and SARAH DORNER, Petitioners herein, hereby certify that on October _____, 1987, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the other party to this suit, the United States of America by depositing such copies in the United States Post Office, Monroe, Louisiana, with first class postage prepaid, properly addressed to Mr. John A. Broadwell, Assistant United States Attorney, Attorney for Defendant, UNITED STATES OF AMERICA, 3B12 Federal Building, United States Courthouse, 500 Fannin Street, Shreveport, Louisiana 71101, and I served three (3) copies of the foregoing Petition for Writ of Certiorari on the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing such copies in the United States Post Office, Monroe, Louisiana, with first class postage prepaid, properly addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, in accordance with Rule 28 of this Court's rules.

All parties required to be served have been served.

_____

C. DANIEL STREET

DATED: October _____, 1987.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

HENRY DORNER, ET AL.

versus CIVIL ACTION NO. 85-2232
CONSOLIDATED

UNITED STATES OF AMERICA

RULING

In this medical malpractice action [1] against the United States of America, plaintiffs, Henry and Sarah Dorner, claim that:

(1) Henry Dorner never gave his "informed consent" to have the November 23, 1983, myelogram performed;

(2) This myelogram was unnecessary and was incorrectly performed, causing his paralysis;

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[1] This suit is brought against the United States pursuant to the Federal Tort Claims Act ("FTCA"). In this medical malpractice action, Louisiana law is controlling. *Low v. United States,* slip op. no. 85-1304 (July 28, 1986).

(3) Defendants failed to properly treat and follow up on their prescribed treatment for plaintiff's decubitus ulcer; and

(4) Sarah Dorner has suffered the loss of consortium of her husband.

The Government denied plaintiff's claims. For the following reasons, judgment is entered in favor of the Government, denying plaintiff's claims.

A. Informed Consent

Before treatment may be legally commenced, the rule is well established that a physician must first obtain the patient's consent. *LaCaze v. Collier,* 434 So.2d 1039, 1043 (La. 1983). Before the performance of the November 23, 1983, myelogram, the attending doctors at the VA hospital must have obtained the consent of Henry Dorner. Although a written consent form was signed, plaintiff contends he was not fully apprised of the risks involved. The Government suggests that all the surrounding circumstances indicate that plaintiff was informed and that it would have been unreasonable for someone in Mr. Dorner's situation to withhold his consent for the treatment.

Lack of valid consent[2] gives rise to an action for damages. *LaCaze,* 434 So.2d at 1048. However, not only must a plaintiff show that an undisclosed risk actually

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[2] LSA-R.S. 40:1299.40 provides Louisiana's standard for what is "valid consent." Mr. Dorner's consent to treatment must be measured by the standards contained either in subsection A or C of this statute, which provides: "A. Notwithstanding any other law to the contrary,

Footnote Continued On Next Page

occurred, but he must also prove "that if the risk had been disclosed, the treatment and the unwanted consequences would have been avoided. (Footnote omitted)." *Id.* To meet this causative link, the plaintiff must prove that but for the failure to inform, the damaging consequences would not have resulted. *Id.* If a reasonable person in plaintiff's situation would have undertaken the treatment in any event, in spite of the deficient "informed consent," there can be no recovery. [3] *Id.*

Footnote Continued From Previous Page

written consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedure which (a) sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb of disfiguring scars associated with such procedure or procedures, (b) acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner, and (c) is signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts. C. Where consent to medical treatment from a patient, or from a person authorized by law to consent shall be valid and effective is subject to proof according to the accordance with Subsection A above, the explanation to the patient or to the person consenting for such patient shall include the matters set forth in Paragraph (a) of Subsection A above, and an opportunity shall be afforded for asking questions concerning the procedures to be performed which shall be answered in a satisfactory manner. Such consent shall be valid and effective and subject to proof according to the rules of evidence in ordinary cases."

[3] "The ultimate deciding factor seems to be that although the

Footnote Continued On Next Page

Here, plaintiff failed to establish the lack of valid consent. The November 23, 1983, myelogram was Mr. Dorner's fourth experience with this procedure. [4] Prior to each test, including the one at issue here, Mr. Dorner signed a written consent form authorizing this procedure. [5] Additionally, Dr. Hill, among other, [6] explained the procedure and the dangers. Specifically, he informed Mr. Dorner of the various risk factors involved:

> "The first is infection – . . . – any time a needle goes through the skin, there's a danger of infec-

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patient has the absolute right, for whatever reasons, to prevent unauthorized intrusions and treatments, he can only recover damages for those intrusions, consent for which would have been reasonably withheld if the patient had been adequately informed." *LaCaze*, 434 So.2d at 1049. An objective test must be applied, for a physician "ought not be cast in damages in a case in which it would have been unreasonable to withhold an informed consent for treatment." *Id.* at 1048-49.

[4] Dr. Robert Hill attempted two (2) pre-operative myelograms but was unable to get spinal fluid. At the request of Dr. Hill, Dr. Angus Dunn, Chief of the Service, performed the third pre-operative myelogram. Dr. Dunn was concerned that something was obstructing the outflow of spinal fluid, so he attempted to inject a small amount of dye to see if it would go in readily. The dye did go in readily, and the test showed there was some kind of mass in the entire lower part of the canal, essentially occupying the space that should have been occupied by spinal fluid. *See* Deposition of Dr. Peter Kark at 20-21.

[5] These forms are facially in compliance with LSA-R.S. 40:1299.40. *Supra* at n.2.

[6] Dr. Hill's testimony establishes that Mr. Dorner was not only counseled by him, but was also counseled by Dr. Dunn and Dr. Kark. *See* Deposition of Dr. Hill at 32.

> tion, and you tell him this is very rare; that we use proper precautions. Then we tell him there are certain serious things that can happen. We tell him it is possible that he can become paralyzed with this examination, but we tell him this is very rare. * * * I still tell them about getting a headache... ."[7]

See Deposition of Dr. Hill at 31-32. The Court holds that this cautionary counseling was given prior to each myelogram, including the one performed on November 23, 1983.

Even if the above counseling was not given, plaintiff still fails on his "informed consent" claim. Dr. Faludi, accepted as an expert in neurosurgery, testified that if he were placed in Mr. Dorner's situation prior to undergoing the fourth myelogram, he would have undertaken the treatment on the treating physician's advice. With his expertise, Dr. Faludi would be even more informed than the "reasonable person" in *LaCaze,* 434 So.2d 1039. In addition, Mr. Dorner also testified that if he had been told of the possibility of paralysis, he would have gone ahead with the treatment. Plaintiff has not met the test outlined in *LaCaze, supra,* thus, his claim for lack of consent is Denied.

B. Malpractice

Aside from his lack of consent, Mr. Dorner also con-

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[7] Dr. Hill did not remember the exact words spoken to Mr. Dorner, but he does remember giving him the usual counseling.

tends that the November 23, 1983, myelogram was unnecessary and was incorrectly performed, resulting in his paraplegia. In this and other malpractice actions, the burden is on the plaintiff to establish the physician's deviation from the standard of care required of others practicing in his same field. LSA-R.S. 9:2794(c); *Gurdin v. Dongieux*, 468 So.2d 1241, 1244 (La. App. 4th Cir. 1985). The elements Mr. Dorner must prove are provided in LSA-R.S. 9:2794(A):

> "(1) The degree of knowledge of skill possessed or the degree of care ordinarily exercised by physicians, licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians, within the involved medical specialty.
> "(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and
> "(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred."

In determining whether a physician possessed the

requisite degree of knowledge or skill or whether he exercised reasonable care and diligence, the Court is guided by expert witnesses who are members of the defendant's professional community and who are qualified to testify. *Gurdin*, 468 So.2d at 1245. Here, we are guided by the testimony of Doctors Faludi, Aranibar, Kark and Bundrick. The general consensus of these physicians is that this case was handled pre-operatively, intra-operatively and post-operatively in conformity with the regular standards of care for these kind of cases.

As to the necessity of the November 23, 1983, myelogram, the Court finds that the test was reasonably necessary considering the circumstances. The purpose of this fourth test, according to Dr. Benzel, was two-fold: (1) to provide a "baseline" of Mr. Dorner's spinal canal for future medical reference, [8] and (2) the possibility for further surgery to remove more of the tumor while Mr. Dorner was relatively healthy. Considering both reasons, all of the doctors testifying agreed that this myelogram was necessary. Even Dr. Aranibar, plaintiff's expert, considering this second reason for the test, agreed with Dr. Benzel; "I agree with...the second reason...which is residual cord compression and the possibility of a reoperation." *See* Deposition of Dr. Aranibar at 32.

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[8] Dr. Benzel testified that "we knew that we left a moderate amount of tumor[;] [w]e also knew that it most certainly would recur with time. Given that Mr. Dorner is not an elderly man, but would expect many years of, hopefully, a healthy life following that surgical treatment, [] we felt we needed to know what the baseline of his spinal canal was like. In other words, if he got a lot better with surgery, or moderately better, and then came back a year later with a mass in his canal and, perhaps, a slight neurologic deterioration, was that deterioration because of something else, or was it because of this growth in his spinal canal." *See* Deposition of Dr. Benzel at 18.

Dr. Faludi, only considering the "baseline" as the purpose for the myelogram, felt that performing the myelogram was a reasonable medical decision. This patient was still experiencing some neurological difficulties; he was having trouble wiggling his toes and was still using a catheter to urinate. Although Dr. Faludi said there was a division of professional opinion, he still felt the surgeon was justified in seeing why his patient was not progressing in these areas. However, when considering both purposes, this division of opinion apparently disappears; the treating physicians were in conformity with the standard of care required in such cases.

The testimony and evidence also show that this myelogram was performed procedurally without flaw. Dr. Faludi testified that the November 23rd myelogram was properly performed in every respect, specifically as to,

(1) The size needle used;
(2) Insertion of the needle;
(3) The dye used;
(4) Concentration of the dye used; and
(5) Return on spinal fluid.

Dr. Hill was conservative in his selection of the needle, the dye and its concentration; he chose a ninety (90) gauge needle and a 190 concentrate of anapaque. Further, he had no trouble locating the canal, meeting with no resistance and having an immediate showing of spinal fluid; Dr. Faludi testified that this lack of resistance and showing of fluid is indicative that the needle was properly placed and inserted.

Dr. Hill inserted the needle at the L2-3 level in this final myelogram. Plaintiffs suggest this was an improper place-

ment of the needle, being too near the spinal cord; however, the evidence does not support this contention. Dr. Faludi and Dr. Kark both testified that placing the needle at the L2-3 level was appropriate and was well below the level at which the spinal cord ends. *See* Deposition of Dr. Kark at 42. Moreover, Dr. Hill took extra precaution in placing the needle, first, by taking "scouting" x-rays of the level before insertion and by performing the myelogram with fluoroscopy, allowing him to see where the needle was going at all times. *See* Deposition of Dr. Hill at 9.

Additionally, the showing of spinal fluid confirms that the needle was properly placed. If the needle had penetrated the spinal cord, there would have been no showing of fluid. The x-rays also corroborate that the needle was not inserted into the cord. Dr. Kark noted that the dye filled the void of the column except for what appeared to be areas of residual tumor. *See* Deposition of Dr. Kark at 40-47 and 102. The overwhelming evidence supports the conclusions that the needle was properly placed. Indeed, Dr. Kark testified that if he was doing this study again, he would place the needle at the same level. *Id.* at 58. Even though the result was tragic, there is no evidence of improper care.

Therefore, the best, or rather, the worst, that can be said for plaintiff's claim is that the ultimate result of the myelogram was unsuccessful. However, "[u]nsuccessful treatment is not per se an indication of malpractice." *Gurdin,* 468 So.2d at 1245; *Chaney v. State Through Department of Health and Human Resources,* 432 So.2d 256 (La. 1983). The testimony does not indicate that the attending physicians lacked the degree of knowledge or skill ordinarily practiced in the Shreveport medical community, or that they failed to use reasonable care and diligence in per-

forming the myelogram. In fact, no evidence of improper care was introduced; plaintiff has failed to carry his burden as to these first two elements.

Plaintiff's case relies largely on an application of the doctrine of Res Ipsa Loquitur. This rule applies when the facts shown suggest the negligence of the defendant as the most plausible explanation of the claimed injury. *McCann v. Baton Rouge General Hospital,* 276 So.2d 259, 261 (La. 1973). However, in the case at bar, plaintiff failed to prove that the attending physicians breached a standard of care ordinarily practiced by physicians in the Shreveport medical community. "Res Ipsa Loquitur is not applicable to malpractice cases involving no more than a failure to obtain satisfactory results from surgery and is limited to untoward or unusual occurrences during the time of medical supervision." *Matranga v. Sara Mayo Hospital,* 463 So.2d 632, 635 (La. App. 4th Cir. 1984). Plaintiff has not shown any negligence on the part of the physicians or an unusual occurrence during the performance of the myelogram other than its unfortunate results. This doctrine simply does not apply to the circumstances at bar.

Moreover, res ipsa loquitur is inapplicable when direct evidence explains procedures and the events leading up to the injury. *McCann,* 276 So.2d at 261. In the pending matter, the Government has presented such evidence explaining the process of the instant myelogram and probable cause of the resulting paraplegia. Specifically, Dr. Faludi and Dr. Kark believe the paraplegia more probably resulted from a vascular problem. The spontaneity and extent of the paralysis, along with other information, tend

to rule out plaintiff's theory of puncture. [9] The more acceptable and probable hypothesis is that Mr. Dorner suffered a form of localized stroke. [10] Nevertheless, the doctrine of res ipsa loquitur is inapplicable to the case at bar, and the Court holds that the myelogram was necessary and was properly performed, not involving the breach of a standard of care required under Louisiana law.

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[9] Plaintiffs suggest that paraplegia resulted from a puncture or nick of the spinal cord; however, this theory is not supported by the evidence in this case. Dr. Benzel testified that "a simple spearing, or penetration of the spinal cord with a needle, although it might cause a minor or significant deficit, most certainly would not cause a complete paralysis. If the needle itself caused the problem, it would take the needle [to have been] inside the spinal cord with the dye then injected at that point." *See* Deposition of Dr. Benzel at 62-63. But, in this case, the x-rays show that the needle was not in the cord; moreover, they show that Mr. Dorner's spinal cord did not extend to the L2-3 level. *See* Deposition of Dr. Kark at 102.

[10] Although there is no way to be sure what caused the paraplegia, Dr. Kark testified that he saw nothing in the record, from his examination of the myelogram films or from his knowledge of Mr. Dorner to lead him to believe that the myelogram, in and of itself, caused the paraplegia. *Id.* at 55. Instead, he feels the paralysis was more probably the result of a vascular problem. *Id.* at 60. "[i]n a man of this age, about the only kinds of neurological events that occur suddenly are ones that involve the blood vessels[,] [a]nd it's quite conceivable that he had, in essence, a stroke of the lower part of the spinal cord. * * *[I]t's conceivable, for example, that the tumor moved, perhaps as a little spinal fluid came out through the needle[;] [t]hat left a little space, and one of the lumps of the tumor could move and could tug upon a blood vessel that might have been partly supplying the tumor and partly supplying the spinal cord." *Id.* at 60-61. Dr. Faludi related a similar occurrence, but suggested the tumor was possibly swollen by the dye, thus causing a vascular problem.

Following this conclusion, the Court notes the inconsistency between Mr. Dorner's and Dr. Hill's account of the pain experienced by plaintiff during the myelogram. Mr. Dorner claims to have experienced severe pain, "like boiling oil washing over his lower extremeties - waive after waive." Dr. Hill does not recall these complaints. The medical records reflect that Mr. Dorner did not complain of paralysis until November 24, 1983, although this complaint notes numbness since the myelogram. Mr. Dorner had experienced a traumatic event in the fact of his paraplegia, and the Court believes his memory of the event is sketchy at best. Mr. Dorner's account is refuted by Dr. Hill's testimony and the medical records.

Plaintiff makes an independent malpractice claim concerning the treatment of his decubitus ulcer. Specifically, Mr. Dorner claims that physicians at the VA Hospital failed to properly treat and follow up on their prescribed treatment for his decubitus ulcer. Applying the same standard annunciated in LSA-R.S. 9:2794(A), *supra*, the Court must also deny this claim. Again, the Court must be guided by expert witnesses who are members of defendant's professional community and who are qualified to testify in determining whether a physician possessed the requisite degree of knowledge or skill or whether he exercised reasonable care and diligence in treating the ulcer. *Gurdin*, 468, So.2d at 1245. Looking to the testimony of Dr. Faludi, Dr. Bundrick and Dr. Denny, the Court concludes that the diagnosis and treatment of Mr. Dorner's ulcer was adequate, breaching no standard of care required in the medical community. It was generally noted that decubitus ulcers, or bed sores, are common with paralysis. [11] The

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[11] "[Decubiti, or ulcers,] seem [] to go along with [paraplegics'] overall condition. The problem with decubiti is...due to their desensate

Footnote Continued On Next Page

accustomed treatments or instructions are to avoid pressure for continued periods, extreme cleanliness, lotions, and antibiotics if infection sets in. Here, the record shows that Mr. Dorner was prescribed these treatments. Aside from shifting, the "donut" was another method to avoid pressure; Dr. Faludi agrees that this prescription was good, acceptable treatment. The availability of another, equally acceptable treatment does not make that prescribed malpractice. There is no evidence that the attending physicians breached the standard of care required in this medical community; this claim is also denied.

C. Loss of Consortium

Sara Dorner, Henry Dorner's wife, makes an individual claim for loss of consortium. In light of the Court's above ruling as to Mr. Dorner's claims, it necessarily follows that her claim must also fail.

THUS DONE AND SIGNED at Monroe, Louisiana, this 22nd day of October, 1986.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Footnote Continued From Previous Page

skin, whether it be totally lacking sensation, especially [in] bony prominent areas...They will have a tendency to break down these areas if they do not shift their position or take pressure off these bony prominences at regular intervals." *See* Deposition of Dr. Denny at 7-8.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

HENRY DORNER, ET AL.

versus CIVIL ACTION NO. 85-2232

UNITED STATES OF AMERICA

JUDGMENT

This matter came on trial before the Court on September 10 and 11, 1986, and pursuant to the foregoing Ruling, which has been filed in the record herein,

IT IS ORDERED, ADJUDGED and DECREED that judgment is rendered in favor of the Government;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that costs shall be paid by the respective parties.

THUS DONE AND SIGNED at Monroe, Louisiana, this 22nd day of October, 1986.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit
Office of the Clerk
July 21, 1987

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 86-4926 - Dorner vs. USA

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. **A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.**

Criminal Appeals. Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal* appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

Court-Appointed Counsel Cases. This Court's plan under the Criminal Justice Act provides that in the event or affirmance or other decision adverse to the party represented, appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court and shall file such petition if requested to do so in writing by such party.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Betty G. Martinez

Deputy Clerk

Enclosure

cc: Mr. C. Daniel Street
Messrs. David A. Titman
John A. Broadwell

OP-JDT-1
Rev. 11/86

FIFTH CIRCUIT STATEMENT ON PETITIONS FOR REHEARING OR REHEARING EN BANC

NECESSITY FOR FILING

It is not necessary to file a petition for rehearing in the Court of Appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

PETITION FOR PANEL REHEARING

A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is *not* to be used for reargument of the issue previously presented or to attack the court's well settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.

EXTRAORDINARY NATURE OF SUGGESTIONS FOR REHEARING EN BANC

A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error or exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matter for *panel rehearing* but not for rehearing en banc.

THE MOST ABUSED PEROGATIVE

Suggestions for rehearing en banc are the most abused perogative of appellate advocates in the Fifth Circuit. While such suggestions were filed in 13% of the cases decided by this circuit last year, less than 1% of the cases decided by the court are reheard en banc; and most of the rehearings granted resulted from a request for en banc consideration by a judge of the court initiated independent of any suggestion.

PETITION FOR REHEARING EN BANC

The form, contents and number of copies of the suggestion are set out in Local Rule 35 copied on reverse side.

OP-JDT-8
Rev. 7/84

Loc.r.35. DETERMINATION OF CAUSES BY THE COURT EN BANC

35.1 Suggestion. A suggestion of en banc consideration upon initial hearing or rehearing may be made as provided in FRAP 35 and herein or by any judge of the court in active service on his own motion. If en banc consideration is granted, every party shall furnish to the Clerk 20 additional copies of every brief the party has previously filed, and 20 copies of each supplemental brief on rehearing the party may file. See also the last sentence of Loc.4. 41 for effect of granting rehearing.

35.2 Form of Suggestion. TWENTY COPIES of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petition for panel rehearing of from any other briefs or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:

35.2.1 Certificate of interested persons required for briefs by 28.2.1;

35.2.2 If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

> I express a belief, based on a reasoned and studied professional judgment, that the panel

decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions of this Court:
[citing specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:
[set forth each question in one sentence]

_____,

Attorney of record for _____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3 Table of contents and citations:

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case;

35.2.6 Statement of any facts necessary to the argument of the issues;

35.2.7 Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8 Conclusion; and

35.2.9 Certificate of Service.

35.3 Response to Suggestion. No response to a suggestion of en banc consideration will be received unless requested by the Court.

35.4 Time and Form-Extensions. Any petition for a suggestion of en banc consideration upon rehearing must be filed within 14 days after the date of the opinion. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered sufficient justification for extensions ... clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed by FRAP and Loc.R. 32.

35.5 Length. A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.

[For other provisions relating to determination of causes by the Court En Banc and Petition for Rehearing, see FRAP 32, 35, 40, Loc.R. 41.3 and I.O.P. following Loc.4. 40.]

OP-JDT-8
Rev. 7/84

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4926
Summary Calendar

HENRY AND SARAH DORNER,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA
VETERANS ADMINISTRATION
MEDICAL CENTER,

Defendant Appellee.

Appeal from the United States District Court for the Western District of Louisiana
(CV85-2232 and 2233)

(July 21, 1987)

Before CLARK, Chief Judge, GARWOOD, and HILL, Circuit Judges.

GARWOOD, Circuit Judge: *

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*Local Rule 47.5 provides: "The publication of opinions tht have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Plaintiffs-appellants Henry Dorner and his wife Sarah Dorner appeal from an adverse judgment dismissing their malpractice claims against the United States, which they brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1982), for injuries Henry Dorner suffered while he was being treated at the Shreveport, Louisiana Veterans Administration Hospital (VA Hospital) in 1983 and 1984. The appellants argue that the district court clearly erred in finding that VA Hospital physicians had not committed malpractice by failing to obtain Mr. Dorner's informed consent to a myelogram performed on November 23, 1983; that the physicians had not ordered the myelogram in contravention of sound medical judgment; that the myelogram had not been negligently performed; and that a decubitus ulcer which Dorner developed in 1984 had not been negligently treated. They also argue that the district court abused its discretion in refusing to reopen the record approximately four weeks after trial to admit into evidence a Board of Veterans Appeals decision granting Dorner disability benefits. Finding no merit in any of these arguments, we affirm the judgment of the district court.

FACTS AND PROCEEDINGS BELOW

Henry Dorner, sixty-four years old and a United States Army veteran who served during World War II, entered the Shreveport VA Hospital on October 12, 1983. Upon admission Dorner, who had a long history of low back pain, complained of pain and numbness in his feet, more pronounced on the right, and of intermittent sharp pain laterally down his right leg. Six months prior to this admission, a prosthesis had been surgically placed into Dorner's right

hip by physicians in Monroe, Louisiana to repair a bone fracture. According to the history given by Dorner upon the present admission, approximately three months after the hip surgery he began experiencing numbness and tingling in the right leg and foot. Several years earlier, Dorner had undergone a colectomy for colon cancer. Dorner also suffered from diabetes and hypertension.

Dorner's admitting physician, Dr. Gerstner, performed a physical examination that revealed significant, asymmetrical weakness in the leg muscles, decreased sensation to light touch, and poor balance. Dr. Gerstner thought Dorner possibly had a herniated disc, so he ordered a lumbar myelogram to be performed for diagnostic purposes.

On October 13, 1983, Dr. Hill, a diagnostic radiologist then employed by the VA Hospital, attempted to do a myelogram on Dorner, but was unable to extract spinal fluid upon insertion of the needle.[1] He abandoned the attempt and tried again, unsuccessfully, a few days later. Dr. Hill then asked Dr. Dunn, who was Chief of Radiology at the hospital, to make an attempt. On October 21, Dr. Dunn did so and was unable to tap spinal fluid; however, he injected dye and was able to complete the myelogram.

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[1] According to Dr. Kark, Chief of the Neurology Service at the VA Hospital, removal of spinal fluid indicates that the needle has been inserted into an appropriate point at which to inject the dye for the myelogram. Proper placement is also aided by viewing the movement of the needle on a fluoroscope screen during insertion. Once the tip of the needle is in the spinal canal, a water-soluble dye is injected. The patient is then maneuvered so the dye spreads through the spinal canal and x-rays are taken of the dyed spinal areas.

Dr. Dunn's myelogram and a subsequently performed CT scan revealed a densely packed, massive tumor throughout much of the lumbar and sacral regions of Dorner's spine. A laminectomy was then performed by Drs. Benzel and Lyles on November 8, 1983, during which most, but not all, of the tumor was removed.[2] Postoperatively, Dr. Benzel diagnosed Dorner's condition as progressive paralysis of the lower extremeties, caused by a cystic dermoid tumor that compressed nerve roots in the sacral area of Dorner's spinal canal.

Following the surgery, the medical records indicate that Dorner's condition significantly improved, but that he still had some neurological deficits. Two weeks after the operation, Dorner was able to walk with a walker and had more strength and sensation in the legs and feet than before the tumor was removed. He was still unable to wiggle his toes, however, and his ability to flex and extend his feet was impaired.[3]

At Dr. Benzel's request, Dr. Hill performed another myelogram on Dorner on November 23, 1983. According

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[2] Dr. Benzel decided not to try to remove the rest of the tumor because it was dangerously near the conus medullaris, a vital area of the spinal cord, and because he thought the tumor had been sufficiently debulked to relieve the pressure on nerve roots in the spine.

[3] As of November 22, Dorner was also unable to urinate without a catheter, but the medical experts testified that this may have been a temporary problem caused by general weakness to the nerves as a consequence of the surgery.

to Dr. Hill, this myelogram was in a technical sense easy to perform because the bones that normally partially obstruct insertion of the needle had been removed during the preceding laminectomy. Dr. Hill reported no difficulties in completing the myelogram; he said spinal fluid came readily out upon insertion, which the x-rays indicate occurred between L2 and L3 of the spine. The following morning, however, Dorner complained that he had been unable to feel or move his legs since the myelogram. Examinations by Drs. Gerstner and Benzel confirmed that as of November 24, 1983, Dorner had a complete loss of motor and sensory functions below the abdominal region. [4]

Since then, Dorner has remained completely paraplegic from the waist down. He was initially treated unsuccessfully with medication and eventually released to outpatient status on January 13, 1984. His paraplegia is considered permanent.

On March 9, 1984, during one of Dorner's periodic outpatient visits to the VA Hospital for follow-up of the para-

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[4] Dr. Gerstner's notes to Dorner's medical records, dated November 24, 1983, state that Dorner had no motor function of the feet or legs, that pin and touch sensation were decreased on the left leg and absent on the right leg and both feet. On Novmeber 26, a surgery resident following Dorner's case noted in the medical records that Dorner seemed to have more sensation in the left leg and that Dorner claimed to have moved his left knee earlier that day. The remaining medical records indicate that Dorner's condition remained essentially unchanged through the date of his discharge from the VA Hospital on January 13, 1984.

plegia, a decubitus ulcer was found on Dorner's left buttock. VA Hospital staff instructed Dorner about how to care for the ulcer and gave him a doughnut cushion on which to sit, which was designed to relieve pressure on the wound by encouraging blood circulation to the affected area. When Dorner returned to the VA Hospital for his next visit on June 18, 1984, orthopedic surgery resident Dr. Denny noted in the medical records that the ulcer was two-and-a-half centimeters in diameter, and that it was clean and dry, had no signs or symptoms of infection, and appeared well cared for. Dr. Denny testified that on June 18 he continued Dorner on conservative treatment for the ulcer, which consisted of having Mrs. Dorner cleanse it frequently and pack it with gauze, and of instructing Mr. Dorner to continue to keep pressure off of the affected area.

The condition of the ulcer worsened, however, and on June 27, 1984, Dorner sought treatment for it at St. Francis Hospital in Monroe, Louisiana. Dorner was hospitalized at St. Francis and conservative treatment was begun, but the ulcer did not heal. Medical records dated July 3, 1984, indicate that the ulcer was then five centimeters in diameter and quite infected. Eventually, the dead tissue in the ulcer had to be surgically removed and replaced with healthy tissue from Dorner's leg. Following this surgery, the wound healed satisfactorily and presented no further problems; however, Dorner has subsequently been hospitalized for treatment of another decubitus ulcer.

Thereafter, on July 26, 1985, Mr. and Mrs. Dorner filed two separate suits against the United States for damages relating to Mr. Dorner's injuries. Both were malpractice

actions brought pursuant to the FTCA. In one, the Dorners alleged that VA Hospital personnel had neglected to warn Mr. Dorner of the risk of paralysis as a result of the myelogram performed on November 23, 1983, and that the VA Hospital had therefore failed to obtain a valid consent by Mr. Dorner to the procedure; that the myelogram was negligently ordered at a time when the test was medically contraindicated; that the myelogram was improperly performed; and that it caused Mr. Dorner's paraplegia. In the other action, the Dorners alleged injuries as a result of negligent treatment of Mr. Dorner's decubitus ulcer by VA Hospital employees.

The two actions were later consolidated and, on September 10-11, 1986, tried without a jury in the United States District Court for the Western District of Louisiana. On October 7, 1986, the Dorners filed a motion to reopen the case for the reception into evidence of a decision by the Board of Veterans Appeals, which the Board had issued on October 1, 1986, and which held that Dorner was entitled to disability benefits in connection with his paraplegia. The district court denied the motion and, on October 22, 1986, rendered judgment in favor of the United States and against the Dorners on all of their claims. The Dorners then moved for a new trial, which was denied. This appeal followed.

DISCUSSION

I. INFORMED CONSENT

On appeal, Dorner first argues that VA Hospital medical staff committed malpractice by failing to obtain his

informed consent to the November 23, 1983, myelogram. Although Dorner signed a written consent form dated November 23, 1986, he contends that he was inadequately apprised of the increased risks involved in performing a myelogram only two weeks after spinal surgery. The government counters that the relevant risk was the risk of paralysis, that this risk was not increased as a result of the preceding surgery, and that even if Dorner was not reminded about the risk of paralysis immediately before the fourth myelogram, he had been fully informed of it prior to the earlier myelogram. Moreover, the government argues, if there was any increased risk of paralysis involved in the last myelogram, the increase was so small that no specific additional warning was required. The district court found that the VA Hospital staff sufficiently informed Dorner of the risks associated with the November 23 myelogram to make his consent valid. Dorner disputes the propriety of this finding. [5]

We need not resolve this dispute, however, because even if Dorner was adequately informed, he has no actionable claim against the government for the VA Hospital staff's failure to get informed consent. Under Louisiana

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[5] Factual findings made by a district court in an FTCA action may be set aside on appeal only if they are clearly erroneous. Fed. R. Civ. P. 52(a); *Ayers v. United States*, 750 F.2d 449, 452 (5th Cir. 1985). According to this standard, we must accept the findings of the trial court unless our review of the relevant evidence leaves us with a "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1511-12 (1985).

law, which concededly governs in this FTCA action,[6] a plaintiff must prove causation in order to recover for lack of a valid consent. To do so, "[n]ot only must the plaintiff show that the undisclosed risk actually occurred, but the plaintiff must also prove that if the risk had been disclosed, the treatment and the unwanted consequences would have been avoided." *LaCaze v. Collier,* 434 So.2d 1039, 1048 (La. 1983). The second aspect of this causation element is tested objectively: if a reasonable person in the patient's position would have consented to the procedure had full disclosure been made, there can be no recovery. *Id.*

In addition to finding that the VA Hospital staff sufficiently informed Dorner, the district court also found that Dorner failed to satisfy his burden of proving that a reasonable person in his situation would not have consented to the myelogram after full disclosure of the risk of paralysis. Two items of testimony support that finding. Dr. Faludi, accepted as an expert in neurosurgery, testified that if he had been in Dorner's position preceding the November 23 myelogram, he would have agreed to the procedure upon the advice of a treating physician. Since Dr. Faludi's testimony indicates his full knowledge of the risks involved, his stated willingness to consent to the myelogram suggests that any reasonable person would probably do the same. Although not controlling under Louisiana's

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[6] In suits brought under the FTCA, liability for medical malpractice is governed by the substantive law of the state in which the malpractice allegedly occurred. See *United States v. Muniz,* 83 S.Ct. 1850, 1852 (1963); *Ayers v. United States,* 750 F.2d, 449, 452 (5th Cir. 1985).

objective standard, Dorner's testimony that had he been informed of the risk of paralysis he probably would have agreed to the myelogram anyway also supports the finding that Dorner failed to establish the causative link between his paralysis and any failure by the VA Hospital staff to obtain a valid consent.

There is adequate evidence on the record to support the district court's finding against Dorner on the causation element of his informed consent claim, and considering the entire record we cannot say that the finding is clearly erroneous. We therefore reject Dorner's challenge to the district court's holding in favor of the government on this claim.

II. NEGLIGENCE

Under Louisiana law, a medical specialist is required to exercise the degree of care and possess the degree of knowledge or skill ordinarily exercised and possessed by physicians within that medical specialty. La. Rev. Stat. Ann. § 9:2794 (West Supp. 1987); *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So.2d 1331 (La. 1978); *Culver v. Ochsner Foundation Hosp.* 474 So.2d 984, 987 (La. App. 5th Cir.), *cert. denied*, 477 So.2d 705 (La. 1985); *Gurdin v. Dongieux*, 468 So.2d 1241, 1244 (La. App. 4th Cir.), *cert. denied*, 474 So.2d 946 (La. 1985). The plaintiff in a medical malpractice action ordinarily must prove that the physician either lacked this degree of skill or failed to use reasonable care, along with his best judgment, in the application of that skill, and that as a proximate cause of his lack of skill or failure to exercise this degree of care, the plaintiff suffered injuries that otherwise would not have occurred. La. Rev.

Stat. Ann. § 9:2794; *accord Culver,* 474 So.2d at 987.[7] At trial, Dorner sought to demonstrate that Dr. Benzel deviated from the requisite standard of care by ordering the November 23 myelogram at a time when sound medical judgment counseled against the procedure, and that Dr. Hill did so by incorrectly performing the myelogram itself. Dorner also attempted to show that the VA Hospital staff was negligent with respect to its treatment of the decubitus ulcer that subsequently developed. The district court found that Dorner failed to meet his burden of proving negligence on the part of VA Hospital personnel with res-

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[7] As set forth in Louisiana Revised Statutes section 9:2794(A), the elements a plaintiff must prove are:

> "(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians . . . licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians . . within the involved medical specialty,
>
> "(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and

Footnote Continued On Next Page

pect to any of these incidences. Dorner now challenges those findings. We find adequate evidence to support the district court's factual findings, and considering the record as a whole we cannot say that any of the challenged findings are clearly erroneous. We therefore affirm this findings in all respects.

A. Decision To Perform Myelogram

Dr. Benzel testified that he requested the November 23 myelogram for two reasons: (1) as a baseline against which to compare potential future neurological deterioration, and (2) to obtain a myelographic map that might explain Dorner's residual neurological deficits and assist the doctors in deciding whether further procedures were presently warranted. Dorner argues that the medical records indicate that contrary to Dr. Benzel's testimony, he did not request the myelogram to determine whether additional treatment was currently indicated, and that taken alone the baseline purpose does not provide a sound medical basis for ordering the myelogram under the circumstances of his case. Moreover, Dorner argues that

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Footnote Continued From Previous Page

> "(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred."

Subsection (C) of section 9:2794 provides that the provisions of the section do not apply to situations where the doctrines of *res ipsa loquitur* applies.

even if current treatment strategy was one of Dr. Benzel's purposes for ordering the myelogram, it was an improvident reason for subjecting Dorner to a myelogram only two weeks after surgery.

The short answer to Dorner's first argument is that the district court believed Dr. Benzel's testimony that he ordered the test for both of the two stated purposes, and it was entitled to do so. Although the medical records specifically stated only the baseline purpose, they documented that Dorner continued to suffer significant neurological deficits in his lower extremeties two weeks post-operatively. Notes to Dorner's medical records state that Dorner still could not walk without assistance and had impaired movement and sensation in his feet and legs. While Dr. Benzel testified that at the time of surgery he thought he had removed all parts of the tumor that were then pressing against nerve roots, he also stated that the persisting neurological deficits later caused him to wonder whether the remaining portion of the tumor was compressing nerves somewhere in Dorner's spine, and if so, whether further surgery would then be medically indicated. The district court's finding that Dr. Benzel performed the myelogram to map current deficits as well as to obtain a baseline for future comparison thus finds adequate support in the record.

Furthermore, although the medical experts disagreed about whether performing the myelogram solely for the baseline purpose was a sound medical decision, all those who testified on the issue agreed that if Dr. Benzel ordered the test in order to determine the extent of remaining pathology, the decision was medically justifiable. The medical testimony therefore amply supports the district

court's finding that Dr. Benzel did not deviate from the requisite standard of care in requesting the November 23 myelogram.

B. Performance Of Myelogram

Dorner contends that his paraplegia was caused by Dr. Hill's negligent insertion of the needle into his spinal cord. The district court specifically considered, and rejected, this theory. The court found that:

> "Dr. Hill inserted the needle at the L2-3 level in this final myelogram. Plaintiffs suggest this was an improper placement of the needle, being too near the spinal cord; however, the evidence does not support this contention. Dr. Faludi and Dr. Kark both testified that placing the needle at the L2-3 level was appropriate and was well below the level at which the spinal cord ends . . . . Moreover, Dr. Hill took extra precaution in placing the needle, first, by taking 'scouting' x-rays of the level before insertion and by performing the myelogram with fluoroscopy, allowing him to see where the needle was going at all times . . .
>
> "Additionally, the showing of spinal fluid confirms that the needle was properly placed. If the needle had penetrated the spinal corld, there would have been no showing of fluid. The x-rays also corroborate that the needle was not inserted into the cord. Dr. Kark noted that the dye filled the void of the column except for what appeared to be areas of residual tumor . . . The overwhelm-

> ing evidence supports the conclusion that the needle was properly placed. Indeed, Dr. Kark testified that if he was doing this study again, he would place the needle at the same level... Even though the result was tragic, there is no evidence of improper care."

Therefore, the district court found, Dorner had failed to carry his burden of proving either that Dr. Hill lacked the degree of knowledge or skill possessed by other radiologists or failed to use reasonable care (with respect to placement of the needle or otherwise) in performing the myelogram.

Dorner challenges this finding on appeal on the ground that the district court should have applied the doctrine of *res ipsa loquitur* in ruling on this allegation of negligence. We find this argument unpersuasive. Although application of the doctrine would have shifted the burden to the government to show an absence of negligence on the part of Dr. Hill, and therefore might possibly have affected the court's finding on the issue of liability, *see, e.g., Culver v. Ochsner Foundation Hosp.*, 474 So.2d 984, 988 (La. App. 5th Cir. 1985)(citing *Langlinais v. Geophysical Service, Inc.* 111 So.2d 781 (La. 1959)),[8] the doctrine of *res ipsa* is simply inapplicable under the circumstances of Dorner's case.

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[8] Under Louisiana law, in order for the doctrine of *res ipsa loquitur* to be applicable it must be shown that: (1) the accident was of a kind that does not normally occur in the absence of negligence, (2) the accident

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Louisiana case law unequivocally holds that the rule of res ipsa does not apply where "a body of direct evidence is available explaining the activity leading to the injury." *McCann v. Baton Rouge General Hosp.*, 276 So.2d 259, 261 (La. 1973); *see also, e.g., Culver,* 474 So.2d at 988. We agree with the district court that such evidence was present in this case.[9] While the needle was inserted in Dorner's spine during the November 23 myelogram, x-rays were taken before dye was injected in order to determine whether the needle was correctly positioned. The x-rays show that the needle was properly placed in the interspace between vertebrae L2 and L3, which was below where Dorner's spinal cord ended. Additional x-rays taken after injection of the dye, but before retraction of the needle, show that the needle was in the same place and that its tip was in the spinal *canal.* We believe these x-rays provide sufficient direct evidence of what happened during the

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was caused by an instrumentality in the actual or constructive control of the defendant, and (3) the information about what actually happened was more readily available to the defendant than to the plaintiff. *E.g., Culver,* 474 So.2d at 987; *Guillory v. Buller,* 398 So.2d 43 (La. App. 3d Cir. 1981).

[9] Although there was no direct evidence as to why dorner became paralyzed, the medical experts were able to hypothesize several possible mechanisms by which the paraplegia could have occurred despite a perfectly performed myelogram. Most of these tie the paralysis to Dorner's considerable pre-existing pathology. Drs. Kark, Aranibar, and Faludi, for example, concurred that the paraplegia may have been caused by an expansion or shifting of the tumor that at or near the time of the myelogram pressed tumor material against the spinal cord or a blood vessel supplying the cord.

myelogram and of where the needle was, at least at the crucial point when dye was injected, [10] to make inapplicable the doctrine of *res ipsa loquitur*. We therefore reject Dorner's argument that the district court applied an improper legal standard in finding for the government on this issue.

C. Treatment Of Decubitus Ulcer

Dorner also complains that the evidence fails to support the district court's finding that VA Hospital personnel were not negligent in their treatment of his ulcer. We disagree. Dr. Denny testified that as of June 18, 1984, the ulcer was small and showed no signs of infection. Although the medical records indicate that Dorner had some fever on that date, none of the testifying physicians were willing to associate the elevated temperature with the condition of the ulcer. All of the physicians who testified about the treatment at the VA Hospital of Dorner's ulcer, including the two doctors who treated Dorner at St. Francis Hospital, agreed that the condition of the ulcer could have deteriorated from a superficial, non-infected bed sore to a badly infected wound requiring surgery during the nine-day period between Dorner's June 18 visit to the VA Hospital and his admission to St. Francis Hospital on June 27. Moreover, none of the testifying physicians faulted the

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[10] The medical experts testified that while injection of the myelogram dye into the spinal *cord* could cause permanent neurological damage as severe as that experienced by Mr. Dorner, merely puncturing the cord with a needle of the size used by Dr. Benzel probably could not.

diagnosis or treatment rendered by VA Hospital personnel. We find adequate support from this medical testimony for the district court's finding of no negligence. Consequently, we likewise reject this challenge by Dorner to the court's unfavorable disposition of his negligence claims.

III. MOTION TO REOPEN

Finally, Dorner argues that the district court committed reversible error in refusing to reopen the case to receive the Board of Veterans Appeals' decision into evidence. The decision whether to grant or deny a motion to reopen a case to admit additional proof is within the discretion of the district court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 91 S.Ct. 795, 802-03 (1971); *Capital Marine Supply, Inc. v. M/V Roland Thomas, II,* 719 F.2d 104, 107 (5th Cir. 1983). An appellate court will interfere with the denial or granting of such a motion only for abuse of that discretion. *Capital Marine Supply, Inc.*, 719 F.2d at 107; 6A J. Moore, J. Lucas, & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 59.04[13] (1986).

In the October 1, 1986, decision that Dorner sought to introduce, the Board of Veterans Appeals determined that Dr. Benzel's ordering of the November 23, 1983, myelogram was "ill-advised in view of the surgery at that site and the veteran's improvement," and that by virtue of the placement of the needle at the "site of the earlier surgery," the myelogram was improperly performed. After reviewing the contents of this decision, the district court decided not to reopen the record to permit its introduction into evidence because, according to the court, the decision

would not facilitate a ruling on Dorner's FTCA claims. In its order denying Dorner's motion to reopen, the district court -- the same judge who tried the case -- explained that the Board's findings were unhelpful because they were based on a legal standard other than the one the court had to apply in ruling on Dorner's malpractice claims under the FTCA. Dorner concedes that the legal standards which apply in the two proceedings differ, but he argues that the district court nevertheless abused its discretion in denying his motion to reopen the record. Although the issue is a close one, we disagree.

The Board of Veterans Appeals stated in its decision that in making findings and conclusions it had resolved "all reasonable doubt . . . regarding service origin, degree of disability, or any other point" in favor of the claimant, Dorner. Governing federal regulations require the Veterans Administration to do so in adjudicating veterans' claims for disability benefits. *see* 38 C.F.R. § 3.102.[11] Pursuant to these regulations, the Veterans Administration must rule in favor of the veteran unless it is convinced beyond a reasonable doubt that he has no viable claim. These regulations thus placed upon Dorner a very significantly lesser burden of persuasion in the administrative proceeding than the preponderance of the evidence standard he

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[11] This Veterans Administration regulation states:

"§3.102 Reasonable doubt.

"It is the defined and consistently applied policy of the

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faced as a plaintiff in federal court. See *Sweet v. United States*, 687 F.2d, 246, 248-49 (8th Cir. 1982). We think this vast difference in applicable legal standards provided a suffi-

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> Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships."

The regulations further impose upon the Veterans Administration "the obligation... to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government." Id. § 3.103

cient basis for the district court's determination that the Board of Veterans Appeals' decision would not assist it in deciding Dorner's case. Consequently, we do not think the district court abused its discretion in denying Dorner's motion to reopen the record. [12]

CONCLUSION

Having carefully reviewed the record, we reject each of Dorner's challenges to the district court's judgment in favor of the government in this FTCA medical malpractice action. Accordingly, we affirm that judgment.

AFFIRMED.

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[12] Dorner also unsuccessfully filed a motion with the district court for a new trial on the basis that the Board of Veterans Appeals' decision was newly discovered evidence; however, on appeal his argument focuses on the district court's refusal to reopen the record. Since we also review a denial of a motion for new trial made on the basis of newly-discovered evidence by an abuse of discretion standard, a challenge by Dorner to the district court's denial of his new trial motion would fare no better than his challenge to the court's denial of his motion to reopen the record. *See, e.g., Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69 (5th Cir. 1986); *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986).

Board of Veterans Appeals, Washington DC 20420

Veterans Administration

In Reply Refer To: 014C 1
C 8 724 544

Mr. Henry Dorner
107 Norris Lane, #34
West Monroe, LA 71291

Dear Mr. Dorner:

The Board has made its decision on the appeal in this case. I am enclosing a copy, which is self-explanatory. Your records are being returned to the office which has jurisdiction over your claim.

Sincerely yours,

Kenneth E. Eaton
Chairman

Enclosure

Fl 1-1
Jun 1984(R)

IN THE APPEAL OF

HENRY DORNER C 8 724 544

BOARD OF VETERANS APPEALS
Washington D.C. 20420

FINDINGS AND DECISION

DOCKET NO. 85-29 669

DATE: OCT 1, 1986

THE ISSUE

Entitlement to benefits pursuant to the provisions of 38 U.S.C. 351 for paraplegia resulting from treatment rendered by Veterans Administration personnel during a hospitalization from October 12, 1983, to January 13, 1984.

REPRESENTATION

Appellant represented by: The American Legion

CONSULTATIONS BY THE BOARD

Michael D. Lyon, Staff Legal Adviser

ITEMS RELATING TO PRESENT APPELLATE STATUS

This case was remanded for further development by Board of Veterans Appeals decision of January 1986. The requested development has been accomplished, and the case has been returned to the Board for further appellate consideration.

It is the policy of the Board of Veterans Appeals in cases involving claims for benefits under the provisions of 38 U.S.C. 351 that the original medical records pertaining to the treatment in question be available for review prior to entry of a final appellate decision. In this case, the original medical records are not available due to other pending actions beyond the Board's control. Copies of the medical records have been provided and, in view of the fact that there appears to be no essential disagreement as to the basic facts of the case, the Board will proceed with its review, utilizing the medical records that are available.

CONTENTIONS

It has been contended by and on behalf of the veteran that he is entitled to benefits pursuant to the provisions of 38 U.S.C. 351. Specifically, it is argued that the veteran has been rendered paraplegic as a result of a myelogram which was performed at a Veterans Administration facility in November 1983. It has been argued that the myelogram was not in order at the time it was conducted, and that, in view of the veteran's improvement, it was negligent to schedule and perform a myelogram at that time. Attention has been directed to the medical evidence of record. It is

requested that all reasonable doubt be resolved in the veteran's favor.

THE EVIDENCE

The veteran had active military service from December 1942 to December 1945.

Available medical records reveal that the veteran has hospitalized at a Veterans Administration facility from October 12, 1983, to January 13, 1984. Initially, he was hospitalized for a physical examination secondary to complaints of sensory deficits on the lateral aspects of both feet with decreased deep tendon reflexes at the right knee. During the early portion of this hospitalization, the veteran complained of right lower extremity numbness.

Subsequent records reveal that, during the hospitalization, numerous attempts to perform a myelogram were undertaken and were unsuccessful. There was apparently great difficulty in introducing the needle into the spinal canal. Subsequently, the veteran underwent a computerized tomography (CT) scan, which showed an intradural tumor.

In early November 1983, the veteran underwent a sacrolumbar laminectomy, with removal of the intradural tumor which was thought to be a dermoid cyst. There was a fibrous tract leading through the sacrum to the dura with a large intradural collection of cheezy-type material.

Postoperatively, clinical data reveal that the veteran improved, and was having resolution of his complaints con-

cerning the lower extremeties. On November 23, 1983, the veteran had a follow-up myelogram performed. Subsequently, he was found to have no motor function or sensory function in the lower extremities. That condition appears to have continued to the present time.

Pursuant to a Board of Veterans Appeals remand, information concerning the myelogram was obtained from a physician at the treating facility. It was his opinion that the myelogram was called for, especially in view of the fact that the veteran had been improving neurologically, to document the amount and volume of persistent tumor that was known to have been left at the time of surgery. An alternative course would have been to undertake additional surgery. It was also felt this myelogram was useful to provide baseline information and anticipation of possible recurrence of the tumor in the future. Specifics regarding the dosage and the amount of medication utilized in the myelogram were not available.

THE LAW AND REGULATIONS

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury or aggravation results in additional disability or death, compensation may be awarded in the same manner as if such disability or death were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the contemplated or foreseeable results of approved medical or surgical care properly administered, no matter how remote, where the evidence does not show that the additional dis-

ability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or other instances of indicated fault on the part of the Veterans Administration. However, compensation is payable in the event of the occurrence of an accident (an unforeseen, untoward event) causing additional disability or death proximately resulting from Veterans Administration hospitalization or medical or surgical care. (38 C.F.R. 3.358(c)(3))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

The Board has carefully considered all the evidence of record as it pertains to the issue under consideration, mindful of the contentions advanced and the doctrine of reasonable doubt. Entitlement to benefits pursuant to the provisions of 38 U.S.C. 351 is predicated upon the positive demonstration of at least two separate factors. First, it must be clearly demonstrated from the record that the veteran has an additional disability as a result of Veterans Administration treatment, and, second, it must also be demonstrated that the treatment produced accidental results or was in some way negligent or was at variance with sound medical principles and procedures. It is our determination after a careful review of this case, that these elements have been met and the appeal should be allowed.

Review of the record reveals that the veteran was originally hospitalized for complaints of lower extremity pathology. There was great difficulty doing a myelogram, apparently in part because of the tumor in the lumbar spinal canal. Other studies ultimately determined that there was such a tumor, and the tumor was removed surgically in early November 1983. Thereafter, the clinical data on file suggest the veteran had significant improvement in his symptoms. On November 23, 1983, a lumbar myelogram was undertaken, resulting in paraplegia. The Board's independent medical review of this claim leads us to conclude that, in view of the veteran's consistent improvement, there was significant doubt as to the advisability of a myelogram at this time. An additional CT scan or other diagnostic procedures, of a more conservative nature, would better have been used.

Even if we were to accept, however, the validity of the argument offered by the Veterans Administration physician concerning the need to obtain baseline information and to determine whether or not there was any residual tumor and, if so, to what extent, it remains difficult to understand why the procedure was done at the site of the earlier surgery. To determine the extent of any remaining tumor cephalad, a cisternal puncture, and introduction of the contrast medium at that site would have been the procedure of choice.

It is our determination, therefore, that the veteran's paraplegia resulted from a Veterans Administration myelogram, the undertaking of which was at variance with sound medical principles and procedures, and, finally, that the needle was inserted in an improper place. As such, the

myelogram was improperly performed.

FINDINGS OF FACT

1. The veteran was hospitalized from October 12, 1983, to January 13, 1984, initially so that studies could be undertaken to ascertain the etiology of lower extremity pathology.

2. There was difficulty performing myelograms during that hospitalization; subsequent evaluations revealed a spinal tumor, which was surgically removed in early November 1983.

3. On November 23, 1983, despite evidence that, postoperatively, the veteran was improving, a lumbar myelogram was undertaken, resulting in the veteran's paraplegia.

4. The undertaking of a lumbar myelogram was ill-advised in view of the surgery at that site and the veteran's improvement; a preferred procedure would have been cisternal introduction of the myelographic material.

5. The veteran has an additional disability, namely paraplegia, resulting from unsound medical treatment at a Veterans Administration facility.

CONCLUSION OF LAW

The criteria for an award of benefits pursuant to the provisions of 38 U.S.C. 351 for paraplegia have been met. (38 U.S.C. 351; 38 C.F.R. 3.102, 3.358(c)(3))

DECISION

Entitlements to benefits pursuant to the provisions of 38 U.S.C. 351 for paraplegia resulting from treatment rendered by Veterans Administration personnel during a hospitalization from October 12, 1983, to January 13, 1984, is established. The appeal is allowed.

PETER B. STOREY U. H. ANG, M.D.

BRUCE E. HYMAN

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

HENRY DORNER, ET AL.

versus CIVIL ACTION NO. 85-2232

UNITED STATES OF AMERICA

O R D E R

IT IS ORDERED that plaintiff's motion to reopen the record for the limited purpose of receiving into evidence the October 1, 1986, decision of the Board of Veterans Appeals is DENIED. After reviewing the decision, the Court notes that the board's decision was made without the original medical records; moreover, the legal standard applied pursuant to 38 U.S.C. § 351 [1] is not the standard that this Court must apply. This decison will not facilitate the Court's ruling; therefore, the record will not be re-opened to receive this evidence.

THUS DONE AND SIGNED at Monroe, Louisiana, this 6th day of October, 1986.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

[1] To be entitled to benefits under 38 U.S.C. § 351, two factors must be shown: (1) it must be clearly demonstrated from the record that

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the veteran has an additional disability as a result of Veterans Administration treatment, and (2) it must be demonstrated that the treatment produced accidental results or was in some way negligent or was of variance with sound medical principles and procedures.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK
TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Mr. Robert H. Shemwell, Clerk
U.S. District Court
500 Fannin St., Rm. 106
Shreveport, LA 71101

No. 86-4926 - DORNER vs. USA, ET AL.

USDC # CV85-2232 & 2233

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☒ Copy of the Court's opinion.

☒ Original record on appeal or review. 4 Volumes.

☒ Other original papers forward with record.
_____ Envelope 1 Box.

☒ Bill of Costs approved by this Court.

☒ Copy enclosed to counsel.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: Margie Thompson
Deputy Clerk

cc: (Letter only)
Hon. Donald E. Walter
Mr. C. Daniel Street
Mr. John A. Broadwell

MDT-1
Rev. 10/86